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IN THE

Supreme Court of the United States

October Term, 1964

No. 960

PENNCO ENGINEERING COMPANY,

Petitioner

v.

ALLIED CHEMICAL CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, plaintiff-appellant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled action on December 7, 1964.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia, including its Findings of Fact and Conclusions of Law, is reported at 235 F.Supp. 625, and

is printed in Appendix A infra at Volume I, page 130a. The United States Court of Appeals for the Fourth Circuit affirmed per curiam; its decision is reported at 339 F.2d 260 and is printed in Appendix A, infra Volume IV, page 6.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 7, 1964.* The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented are:

1. Can drawings of a prior patent be interpreted according to the opinion of a trial court to show something not disclosed in the patent specification and this interpretation then relied upon as prior art against a later patent covering a meritorious invention?

2. Can the statutory presumption of validity, which is accorded a patent under 35 U.S.C. §282, be weakened or destroyed by such an interpretation of the drawings of a prior patent which the Patent Office "failed" to cite or consider?

3. Did the Courts below apply the proper legal standards in holding that the Nusbaum patent in suit No. 2,956,708 is invalid for lack of invention?

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* See Record Vol. IV, pp. 5, 8.

STATUTE INVOLVED

The District Court referred to §282 and §103 of Title 35 U.S. Code, and those sections are involved here in connection with questions 2 and 3 respectively. These sections read as follows:

§ 282. Presumption of validity; defenses

A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

(1) Noninfringement, absence of liability for infringement or unenforceability,

(2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability,

(3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of sections 112 or 251 of this title,

(4) Any other fact or act made a defense by this title.

In actions involving the validity or infringement of a patent the party asserting invalidity or noninfringement shall give notice in the pleadings or otherwise in writing to the adverse party at least thirty days before the trial, of the country, number, date, and name of the patentee of any patent, the title, date, and page numbers of any publication to be relied upon as anticipation of the patent in suit or, except in actions in the United States Court of Claims, as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having

prior knowledge of or as having previously used or offered for sale the invention of the patent in suit. In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires. July 19, 1952, c. 950, § 1, 66 Stat. 812.

§ 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made. July 19, 1952, c. 950, § 1, 66 Stat. 798.

STATEMENT OF THE CASE

Petitioner brought this suit against Respondent for infringement of U. S. Letters Patent No. 2,956,705 issued on October 18, 1960, to Petitioner as assignee of the inventor, Simon Richard Nusbaum (Appellant's Appendix Vol. II, p. 144a).

The subject matter of invention of the patent in suit has to do with a container for holding and dispensing a refrigerant medium such as Freon which is charged into the container under pressure so that some exists therein in the liquid state and some in the gaseous state.

Such containers are used for charging the refrigerant in measured amounts, and selectively in either gaseous or liquid form, into a refrigerating or air conditioning system or the like. For these purposes the container, usually cylin-

drical in shape, is provided at one end with an outlet passage controlled by a manual shut-off valve. When it is desired to charge the refrigerant in gaseous form, the cylinder is stood upright on its opposite end so that the body of liquid therein occupies the lower end so that the gaseous head space above the liquid is in communication with the outlet passage. On the other hand, in order to charge the refrigerant in the liquid state, the cylinder must be inverted and maintained in that position so that when the body of liquid fills the lower end, it is in communication with the outlet passage.

In both cases, the valve must be opened and closed by hand at the right moments to charge the desired measured quantity of refrigerant, the container being maintained in either one or the other position throughout charging. For a number of reasons, however, it is difficult for the serviceman to hold the container in the inverted position and at the same time to operate the valve manually at the right moments. To eliminate these difficulties, Nusbaum surrounded the valve and outlet passage with a collar of sufficient length to allow the cylinder to stand on its end in inverted position without allowing the valve to touch the supporting surface. The collar extended beyond the end of the valve a substantial amount so that the valve handle was spaced from the supporting surface enough to be readily grasped by the serviceman and easily and quickly manipulated. To permit such manipulation of the valve, in either position of the cylinder, the collar was provided with a side access opening.

The District Court held the patent invalid as lacking invention, but in reaching this conclusion it evidently relied in part on its own unjustified interpretation of the drawings of a prior patent not cited by the Patent Office (Underhill No. 2,234,458) to "weaken" the statutory presumption of validity which otherwise would have supported the patent under 35 U.S.C. §282.

REASONS FOR GRANTING THE WRIT

1. THE DRAWINGS OF A PATENT CANNOT BE INTERPRETED TO DISCLOSE SOMETHING TOTALLY ABSENT FROM THE SPECIFICATION, ESPECIALLY WHERE THERE IS NO CLEAR SHOWING EVEN IN THE DRAWINGS THEMSELVES. IN THIS RESPECT THE RELIANCE OF THE COURTS BELOW ON THE UNDERHILL PATENT WAS CONTRARY TO THE LAW ESTABLISHED BY THE DECISIONS OF THIS COURT.

The Underhill patent * shows a cylindrical container having an outlet passage and valve at one end which are surrounded by a collar. It also shows the inversion of the cylinder to rest on this collar when it is desired to *empty* the container, the discharge valve of course being left open until all the contents have drained out.

There is *nothing in the patent* which *describes any operation of the valve in this inverted position of the cylinder*, as would be necessary to charge a measured quantity less than the entire contents of the cylinder. The most that Respondent's witness would say in this respect was that "it *appears* that the valve is readily *accessible*." (Appellant's Appendix, Vol. I, page 58a).

In spite of lack of disclosure in the specification and ambiguity of the drawings, the District Court (Finding of Fact No. 26; Appellant's Appendix, Vol I, p. 138a) took the position that the drawings of the container in the upside-down position "showed plenty of room to operate the handwheel while the container is in use."

One of the first authoritative pronouncements of this Court with regard to the significance of the drawings of a patent, as differentiated from express description, was in the leading case of *Topliff v. Topliff*, 145 U.S. 156, 12 S.Ct. 825, 36 L.Ed. 658. At page 161 of 145 U.S., this Court said

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* Appellant's Appendix, Vol. II, p. 296a.

with reference to an asserted interpretation of patent drawings that:

> "It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions."

The principle of the above quotation has been consistently followed ever since *Topliff*. In 1922, the Sixth Circuit Court of Appeals summarized the law in *Fulton Co. v. Bishop & Babcock Co.*, 284 F. 774, 777, as follows:

> "We recognize that prior patents are part of the prior art only by what they disclose on their face (Naylor v. Alsop Process Co. [C. C. A. 8] 168 Fed. 911, 920, 94 C. C. A. 315; Munising Co. v. American Sulphite Pulp Co. [C. C. A. 6] 228 Fed. 700, 703, 143 C. C. A. 222); that prior accidental production of the same thing, where the character and function were not recognized until the invention of the later patent, does not effect anticipation (Tilghman v. Proctor, 102 U. S. 707, 711, 26 L.Ed. 279; Topliff v. Topliff, 145 U. S. 156, 161, 12 Sup. Ct. 825, 36 L.Ed. 658; Canda v. Mich. Iron Co. (C. C. A. 6) 124 Fed. 486, 492, 61 C. C. A. 194; Munising Co. v. American Co., supra, 228 Fed. at page 703, 143 C. C. A. 222); and that anticipation is not disclosed by a drawing which only incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention, and was not itself adopted and used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor (Gray Telephone Co. v. Baird Co. [C. C. A. 7] 174 Fed. 417, 421, 98 C. C. A. 353; Munising Co. v. American

Co., supra, 228 Fed. at pages 703, 704, 143 C. C. A. 222)*

This Court had occasion to consider this point again in *Permutit Co. v. Graver Corp.*, 284 U.S. 52, where it said at page 60:

> "Moreover, while drawings may be referred to for illustration and may be used as an aid in interpreting the specification or claim, they are of *no avail* where there is *an entire absence of description of the alleged invention or a failure to claim it.* McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 116; Tinker v. Wilber Eureka Mower & Reaper Mfg. Co., 1 Fed. 138, 139; Gunn v. Savage, 30 Fed. 366, 369; Windle v. Parks & Woolson Machine Co., 134 Fed. 381, 384-5. The statute requires the patentee not only to explain the principle of his apparatus and to describe it in such terms that any person skilled in the art to which it appertains may construct and use it after the expiration of the patent, but also to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not. Merrill v. Yeomans, 94 U. S. 568, 573; Seymour v. Osborne, 11 Wall. 516, 541. The free bed was neither described in the specification nor claimed in either Claim 1 or Claim 5. Compare Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 278; Alexander Milburn Co. v. Davis-Bournonville Co., 270 U.S. 390, 401." (Emphasis supplied.)

The consistent lack of authority illustrated by the above cases shows clearly that *in the total absence of any*

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* Later cases to the same effect include *Des Rosier v. Ford Motor Co.*, 143 F.2d 907, 912 (C.C.A. 1); *Trussell Mfg. Co. v. Wilson-Jones Co.*, 50 F.2d 1027, 1029 (C.C.A. 2); *Fo d Machinery Corp. v. Pacific Can Co.*, 66 F. Supp. 109, 112 (D.C.N.D. Cal.); *Goodrose Co., Inc. v. Charles Hvass and Co.*, 70 F.2d 625, 627 (C.C.A. 2).

description of "plenty of room to operate the handwheel" while the container is inverted, the lower court could not properly interpolate this feature into the Underhill patent merely on the basis of an inspection of the drawings, especially where there was no clear indication of this feature in the drawings themselves. In this respect, therefore, the findings, conclusions, and decision of the District Court and the affirmance per curiam by the Court of Appeals were in conflict with established law, more particularly with the above decisions of this Court.

2. THE STATUTORY PRESUMPTION OF VALIDITY IS NOT WEAKENED IN THIS CASE BY THE FACT THAT THE UNDERHILL PATENT WAS NOT CITED BY THE PATENT OFFICE. IN DECIDING THE CASE ON THIS PREMISE, THE COURTS BELOW APPLIED ERRONEOUS LEGAL PRINCIPLES.

Under §282 of Title 35, U.S. Code, the patent in suit is presumptively valid:

> "A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it."

The quoted §282 appeared in the patent laws for the first time in the codification of the patent laws in the Patent Act of 1952. However, this codification merely set forth in statutory form that which had been established law for many years. For example, the decision of this court in *Diamond Rubber Co. v. Consolidated Tire Company*, 220 U.S. 428 (1931) stated at page 434:

> "It possesses such amount of change from the prior art as to have received the approval of the Patent Office, and is entitled to the presumption of invention which attaches to a patent."

The presumption is undoubtedly salutary as to prior art considered by the Patent Office before a patent is granted. For obvious reasons, however, it loses force as to a non-cited reference which is *more pertinent* than the references actually cited by the Patent Office Examiner; here the fact of greater pertinence of a non-cited reference gives rise to a presumption that the Examiner must have overlooked it. This was the situation in *Triumph Hosiery Mills, Inc., v. Alamance Industries, Inc.*, 299 F.2d 793 (C.A.4) on which the District Court relied in the present case in holding that the presumption was weakened in the present case by "failure" to cite the Underhill patent (Conclusion of Law No. 2, Appellant's Appendix, Vol. I, page 139a). The fact which the District Court overlooked in the present case is that the Underhill patent is no better reference than, if as pertinent as, Belgian Patent No. 514,045 (Appellant's Appendix, Vol. II, p. 299a) that the Patent Office did cite. Therefore the *Triumph* case does not apply.

There was no reason for the Examiner to have cited two patents where one would be just as effective, and therefore no presumption arises from alleged "failure" to cite the second patent. On the contrary, the presumption is that the Examiner, in the proper conduct of his job, did consider the Underhill patent but did not cite it because it was merely cumulative. The record shows that the Examiner did make a search in the class and subclass in which the Underhill Patent was classified.*

The only thing which the Patent Office "failed" to consider was the unjustified interpretation which the District Court placed upon the drawings of the Underhill patent. The Examiner, skilled in the daily application of rules of patent interpretation, undoubtedly took the Underhill patent at face value, as he should have done; did not read into it something that was not there, as did the District Court in the present case; and therefore did not cite this patent

* See Appellant's Appendix, Vol. I, pp 109a-111a; Vol. II, pp 290a and 295a.

but instead relied on the equivalent disclosure of Belgian Patent No. 514,045.

Under these circumstances, it is plain that the Nusbaum patent in suit is entitled to the benefit of the presumption of validity established by §282 quoted above. Under the circumstances of the present case, this presumption is not weakened but instead is strengthened for the reasons stated in *Power Curbers, Inc. v. E. D. Etnyer and Co.*, 298 F. 2d 484 (C.A.4), at page 493:

> "The fact that the defendants were unable to come up with any prior art more pertinent than the McIntyre patent strengthens the presumption of the validity of the patent in suit. As was said in Reynolds v. Whitin Mach. Works, 167 F.2d 78, 84 (4th Cir.), certiorari denied, 334 U.S. 844, 68 S.Ct. 1513, 92 L.Ed. 1768 (1948), '* * * patents for useful inventions ought not be invalidated and held for naught because of such excursions into the boneyard of failures and abandoned experiments.' In Chesapeake & O. Ry. Co. v. Kaltenbach, 95 F.2d 801, 804 (4th Cir. 1938), this court held: '* * * [T]he presumption of validity is strengthened where, as here, the principal references urged against the patent have been considered by the Patent Office.' See also Manville Boiler Co., Inc. v. Columbia Boiler Co. of Pottstown, Inc., 269 F.2d 600, 603 (4th Cir.), certiorari denied, 361 U.S. 901, 80 S.Ct. 208, 4 L.Ed. 2d 156 (1959); Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, 35 F.2d 433, 437 (4th Cir. 1929), certiorari denied, 280 U.S. 609, 50 S.Ct. 158, 74 L.Ed. 652 (1930)."

3. THE LOWER COURTS APPLIED ERRONEOUS LEGAL STANDARDS IN DECIDING THAT THE PATENT IN SUIT WAS INVALID FOR LACK OF INVENTION.

The preceding sections of this petition show that the lower courts, particularly the District Court, relied on a legally fallacious interpretation of the Underhill patent to discount the statutory presumption of validity. The District Court then compounded the fallacy by holding (Conclusion of Law No. 5; Appellant's Appendix, Vol. I, p. 140a) that because lack of invention was "not doubtful", commercial success did not count either.

From these faulty premises, the District Court further proceeded to hold the patent in suit invalid in its entirety on the grounds stated in its Conclusions of Law Nos. 4(a) and 4(b). But *The Great Atlantic and Pacific Tea Co. v. Super Market Equipment Corp.*, 340 U.S. 147, on which these conclusions were based, dealt expressly with "combination patent claims", and approved an "exacting" standard of invention only with reference to "a combination [is] made up entirely of old elements". The present case does not involve such "combination patent claims".

If *A and P* applies to the present case, it is because §103 not only adopts the "exacting" standard of that case but also extends it to patent cases in general instead of to "combination patent claims" only.

On the other hand, an impressive number of cases since the Patent Act of 1952 have held that §103 liberalized the standard of invention. A leading case in this category is *Lyon v. Bausch and Lamb Optical Co.*, 224 F.2d 530 (1955), in which the late Judge Learned Hand adopted the construction of this section, and his decision was subsequently followed in a number of other circuits.[1] Among them

[1] See *R. M. Palmer Co. v. Luden's*, 236 F.2d 496 (3rd Cir); *Plax Corp. v. Precision Extruders, Inc.*, 239 F.2d 792 (3rd Cir); *Fisch v. Goul*, 246 F.2d 5 (3rd Cir.); *Brown v. Brock*, 240 F.2d 723 (4th Cir); *Otto v. Koppers Co.*, 246 F.2d 789 (4th Cir); *L-O-F Glass Fibers Co. v. Watson*, 228 F.2d 40 (C.A.D.C.).

was the Fourth Circuit which, following *Brown v. Brock* and *Otto v. Koppers* (see footnote 1), continued to follow the *Lyon* case and Judge Hand's "sensitive observations" (Palmer v. Ludens, footnoted) and the liberal standard of patentability.[2]

One of the most recent decisions in the Fourth Circuit on the point, *Berry Bros. Corporation v. Sigmon*, 317 F.2d 700 (1963), adopted the same view, after once more discussing thoroughly the divergent views of the various courts. With regard to the present case, *Berry v. Sigmon* is of particular interest because of its statement (p. 705):—

> It may well be that neither the statutory presumption of validity alone nor the evidence of commercial success alone would overcome the doubts raised as to this patent's validity; but *taking the presumption and the evidence of commercial success together*, we are led to accept the conclusion of the District Judge. (Emphasis supplied)

If neither of these considerations was available to the Court of Appeals in the present case, it was at least in part because of the District Court's legally unjustifiable interpretation of the Underhill patent.

The cases just discussed do not turn on whether the modification of the prior art, required to adapt it to Nusbaum's purposes, was "slight" (see Conclusion of Law No. 4(a)) or large. It is not quantum of change that counts, but instead quality or character of change and particularly the extent to which it is "obvious" to one having ordinary skill in the art. This test of invention stated in §103 merely codified existing law established by many years of precedent in this Court and in the lower courts. Among precedent authorities which clearly negative the quantum concept is

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[2] *Manville Boiler Co. v. Columbia Boiler Co. of Pottstown*, 269 F.2d 600; *Entron of Maryland, Inc. v. Jerrold Electronics Corp.*, 295 F.2d 670; *Power Curbers, Inc. v. E. D. Etnyer and Co.*, 298 F.2d 484, 493.

Hobbs v. Beach, 180 U.S. 383, in which this Court pointed out that patentable invention could reside in the recognition that a thing could be adapted to a different use, even though the amount of change in the form of mechanical alterations was very small. It said at pp. 392 and 393:—

> We agree with the courts below that it did involve invention *to see that a machine* of the Dennis and York type *was adaptable to the work of the Beach device*, and, second, to make such changes as were necessary to adapt that device to its new function. With all the anticipating devices before us, it is apparent that the mere *change* in the shape of the dies *was a minor part* of the work involved in so changing the Dennis and York machine as to make it perform a wholly different function, *the invention consisting rather in the idea that such change could be made*, than in making the necessary mechanical alterations. (Emphasis supplied)

In the present case, the inventor Nusbaum described the type of refrigerant charging cylinder that was in use for years prior to his invention, although its use was accompanied by substantial difficulties.* Also "propane pots" of the types introduced in evidence in this case and referred to by the District Court in Conclusion of Law No. 4(b) had been known for years prior to Nusbaum's invention. But it was not until 1958 that Nusbaum conceived the invention of the patent in suit, a substantial improvement in the art as shown by its prompt adoption and use, i.e., its commercial success. Meanwhile respondent, a long-time user of propane pots, never thought of adapting them to Nusbaum's purpose. Instead respondent respected Nusbaum's patent for several years while making various unsuccessful efforts to avoid it by the use of non-infringing alternatives and until respondent was finally obliged to pay Nusbaum's invention the tribute of imitation.

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* Appellant's Appendix, Vol. I, pp. 10a-13a.

Under such circumstances, it cannot be said that Nusbaum's invention was "obvious" to persons skilled in the art. All of the record points in the opposite direction.

CONCLUSION

The foregoing considerations all point to the urgent need for an authoritative pronouncement by the Supreme Court as to the meaning and interpretation to be given to §103 and the standard of invention thereby defined for the first time in statutory terms.

Since the 1952 Patent Act, a wide variety of different applications of §103 have been made by different courts, with a resultant state of confusion as to the meaning of the section. It is important for the reconciliation of the conflicting interpretations of this section, and in the interest of uniformity of application of the section by different courts, that the Supreme Court express its views for the guidance of the lower courts in this important branch of federal law. Only in this way will it be possible to achieve the stabilization desired and intended by Congress in enacting §103.

For the above reasons, this Petition should be granted.

Respectfully submitted,

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